Filed 8/30/19 L.A. Times Communications LLC v. So. Cal. Regional Rail Authority CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| LOS ANGELES TIMES COMMUNICATIONS LLC et al.,<br><br>Appellants,<br><br>v.<br><br>SOUTHERN CALIFORNIA REGIONAL RAIL AUTHORITY,<br><br>Respondent. | B280021<br><br>(Los Angeles County Super. Ct. No. BS158628) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Amy D. Hogue, Judge. Affirmed.

Law Offices of Kelly Aviles, Kelly A. Aviles; Los Angeles Times Communications, Jeff Glasser; Californians Aware and Joseph T. Francke for Appellants.

Cannata, O'Toole, Fickes & Almazan and Karl Olson for First Amendment Coalition, California News Publishers Association, Southern California News Group, Center for

Investigative Reporting, and Northern California Society of Professional Journalists as Amici Curiae on behalf of Appellants.

Hanson Bridgett, Adam W. Hofmann and Josephine K. Mason for Respondent.

Woodruff, Spradlin & Smart and Kendra L. Carney; Churchwell White and Nubia Goldstein for California Cities, California State Association of Counties, and California Special Districts Association as Amici Curiae on behalf of Respondent.

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In February 2015, a train operated by respondent Southern California Regional Rail Authority (Metrolink) derailed after colliding with a truck left on the tracks near Oxnard, California. Causing injury and death. During the subsequent investigation, an expert working on behalf of Metrolink identified a possible defect in the design of Metrolink's fleet of Hyundai Rotem cab cars that, if discovered by the wrong people, could be exploited to intentionally derail other trains.[1] After receiving the expert's report, Metrolink's board of directors (board) held an emergency, closed meeting via teleconference to discuss possible safety concerns relating to the cab cars, and to consider the plan Metrolink's staff had formulated to address the perceived risk.

Los Angeles Times (the Times) and Californians Aware (CalAware) sued Metrolink, alleging the meeting violated provisions of the Ralph M. Brown Act (Gov. Code, § 54950 et seq. (the Brown Act)[2] governing emergency meetings, closed sessions,

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[1] A cab car is a passenger car with a control cab, equipped with controls from the locomotive, that operates at the front of a train when a locomotive pushes it from behind.

[2] All further statutory references are to the Government Code unless otherwise indicated.

and meetings conducted via teleconference by local public agencies. The trial court denied appellants' petition for writ of mandate and other equitable relief, concluding the board acted within its discretion under the act. As we shall explain, we affirm.

## BACKGROUND

We draw the facts principally from Metrolink's return and declarations to assess whether the local agency abused its discretion under the applicable standard of review. (*Helena F. v. West Contra Costa Unified School Dist.* (1996) 49 Cal.App.4th 1793, 1799 (*Helena F.*).) We note, however, that questions of statutory interpretation and application of the law to undisputed facts, are subject to our de novo review. (*Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 619 (*Unnamed Physician*).)

### I. The Oxnard derailment

On February 24, 2015, a Metrolink train collided with a truck left on the tracks near Oxnard. The engineer died and 30 others were injured.

The Oxnard crash was not the first time a Metrolink train derailed under similar circumstances. In 2005, a Metrolink train derailed near Glendale after colliding with an SUV intentionally left on the tracks. Eleven people died and many people were injured. A man had doused the vehicle with gasoline and left it on the tracks intending to commit suicide and to kill as many people as possible.

Following another fatal accident in 2008 when 25 passengers were killed in a head-on collision with a freight train near Chatsworth, Metrolink invested approximately $263 million

in safety upgrades that included the purchase of a new fleet of Hyundai Rotem cab cars which were designed to avoid derailment in the event of a collision. The Metrolink train involved in the Oxnard derailment was equipped with a Hyundai Rotem cab car.

II. The possible design defect in Metrolink's cab cars

In response to lawsuits arising from the Oxnard derailment, Metrolink initiated an investigation of the accident's cause. On Friday, August 28, 2015, an expert investigator analyzing the crash advised Metrolink's legal department that a preliminary analysis suggested a possible safety issue with Metrolink's fleet of Hyundai Rotem cab cars. The next Monday, August 31, Metrolink's legal department notified its executive team about the investigator's preliminary analysis.

After conducting what Metrolink's chief executive officer (CEO) described as a "fairly detailed analysis" of the complex, technical information the investigator had presented, Metrolink's executive team came to understand that the safety concern the investigator identified implicated the security of Metrolink's ongoing operations, and was information that, if accurate and known by the wrong people, could be exploited to cause mass harm to both Metrolink's riders and the public at large.

III. The emergency, closed session with Metrolink's legal counsel

On September 2, 2015, Metrolink began negotiations to lease locomotives to replace or fortify the potentially defective cab cars. The same day, the executive team scheduled an emergency teleconference meeting for 5:00 p.m. Metrolink's CEO had determined the meeting was critical to advise the board about the

safety concerns with the cab cars and related operational security issues. He also deemed it crucial to notify the board of the executive team's plan for addressing the perceived risks, and to give the board an opportunity to provide feedback and, if necessary, to direct further or different action regarding the appropriate steps to address the concerns, while maintaining Metrolink's commuter service to the greatest extent possible.

Metrolink staff circulated an agenda to the board members around noon. Despite holding the meeting by teleconference, Metrolink did not post an agenda at the teleconference locations and it did not list the teleconference locations on the agenda. The agenda did state that a conference room at Metrolink headquarters was available for public participation and would be connected to the board-meeting conference line.

The board unanimously voted in open session to determine that the emergency meeting was justified and that a closed session was needed to discuss a threat to the security of public services. The board's post-meeting minutes reflected that the board met in closed session to discuss a threat to public services or facilities, and reconvened in open session approximately 20 minutes later, at which time Metrolink's general counsel indicated there were "no reportable actions."

The next day, September 3, 2015, Metrolink publicly announced a plan to lease locomotives and to position them in front of the Hyundai Rotem cab cars.

## IV. Appellants' petition for writ of mandate

After Metrolink rejected the demands of the Times and CalAware to cure and correct alleged Brown Act violations, and to cease and desist from such conduct in the future, appellants filed a verified petition for writ of mandate, and declaratory and

injunctive relief. The petition asserted three principal Brown Act violations: First, appellants argued that a "possible design flaw" in Metrolink's cab cars could never constitute a security threat under the Act's closed session provision. Second, they claimed the "potentially defective condition" of the cab cars did not constitute an "emergency situation" as defined in the Brown Act. Third, they asserted Metrolink failed to comply with procedural requirements pertaining to posting and the contents of an agenda for meetings held via teleconference. Appellants maintained relief was warranted for these alleged past violations because Metrolink's prelitigation correspondence indicated it was "likely to continue to violate the Brown Act." Thus, appellants sought a declaration that Metrolink's actions violated the Brown Act, and a writ of mandate directing Metrolink to release all documents related to the closed session and to record all future closed sessions for three years.

Metrolink filed a return largely admitting the bare recitation of factual events in the petition, but denying allegations concerning the internal events and thinking that preceded the September 2, 2015 emergency, closed session.

V. The judgment denying appellants' petition

The trial court recognized that the parties "dispute[d] the facts" concerning the nature of the defect, with appellants asserting the information transmitted to the board evidenced a "relatively trivial" defect, while Metrolink maintained the defect "threatened widespread potential harm," "if known to malfeasants." But the court found there was "no dispute the Board convened without any indication of a concrete or imminent threat" and there was "no indication . . . malfeasants had already learned about the defect and threatened to act or engaged in

preparations to take action." The court reasoned that the assessment of a threat's magnitude was a matter committed to the board's judgment and, therefore, notwithstanding other undisputed evidence, the court "decline[d] to substitute its judgment for [that] of the agency" and found "no abuse of discretion[ ] in treating the information as presenting an emergency justifying closure of discussion with respect to the information."

The trial court also ruled Metrolink was not required to comply with the Brown Act's teleconference requirements, concluding the requirements do not apply to emergency meetings. And, the court found the board took no action at the meeting, there was no threat of a future violation, and, thus, there was "no reason to issue an order to stop present violations or prevent future violations."

## DISCUSSION

### I. Standard of review

The parties disagree on the standard that governs review of Metrolink's decision to hold an emergency, closed meeting under the Brown Act.

Traditional mandate under Code of Civil Procedure section 1085 governs, rather than administrative mandate, because the matter before the Metrolink board was not one in which the law required evidence to be taken. (Cf. Code Civ. Proc., § 1094.5, subd. (a).) Under Code of Civil Procedure section 1085, subdivision (a), a writ of mandate will lie "to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station."

Mandate will not lie to force the exercise of discretion in a particular manner. But it will lie to correct abuses of discretion. "In determining whether an agency has abused its discretion, the court may not substitute its judgment for that of the agency, and if reasonable minds may disagree as to the wisdom of the agency's action, its determination must be upheld." (*Helena F.*, *supra*, 49 Cal.App.4th at p. 1799.) Thus, "[t]he trial court's inquiry in a traditional mandamus proceeding is limited to whether the local agency's action was arbitrary, capricious, or entirely without evidentiary support, and whether it failed to conform to procedures required by law." (*Neighbors in Support of Appropriate Land Use v. County of Tuolumne* (2007) 157 Cal.App.4th 997, 1004.)

When an action is challenged as arbitrary, capricious, or entirely without evidentiary support, the agency's judgment is entitled to deference and its action can be reversed only if no reasonable person could have reached the same conclusion based on the evidence, whether disputed or undisputed. (*No Oil, Inc. v. City of Los Angeles* (1987) 196 Cal.App.3d 223, 243.) Conversely, when the material facts are undisputed and the action is challenged on the ground that the agency failed to conform to the procedures required by law, the judicial inquiry turns to a legal question: what does the statute require? (*Unnamed Physician*, *supra*, 93 Cal.App.4th at p. 619.) The construction of a statute is purely a question of law, subject to the court's independent determination, without deference to the agency's judgment. (*Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 917.)

Here, we must determine as a matter of statutory construction whether, viewing the evidence (disputed and

undisputed) in the light most favorable to the board's judgment, Metrolink had discretion under the Brown Act to hold an emergency, closed meeting. However, to the extent appellants challenge the board's action based on a dispute over the urgency of the claimed emergency or the magnitude of the purported threat, we must defer to the agency's judgment and can reverse the action on this ground only if the decision was arbitrary, capricious, or entirely without evidentiary support. As for whether the Brown Act's teleconference provisions apply to emergency meetings, this is purely a question of statutory interpretation subject to our independent review. Finally, we review the trial court's evidentiary rulings for prejudicial abuse of discretion. (See *Christ v. Schwartz* (2016) 2 Cal.App.5th 440, 446–447.)

## II. The Brown Act: declaration of intent and rules governing statutory construction

"Open government is a constructive value in our democratic society." (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 380.) The Brown Act furthers this value by ensuring the public's right to attend the meetings of public agencies. (*International Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, Inc.* (1999) 69 Cal.App.4th 287, 293.) The act thus requires a local agency to give notice and post an agenda at least 72 hours before a regular meeting or 24 hours before a special meeting, and to make all meetings open and public, except as specifically provided in the act. (§§ 54954, 54956, 54953, subd. (a), & 54962.)[3] "The Act thus serves to facilitate public

[3] As stated in section 54953, subdivision (a), the Brown Act applies to "meetings of the legislative body of a local agency." For

participation in all phases of local government decisionmaking and to curb misuse of the democratic process by secret legislation by public bodies." (*Golightly v. Molina* (2014) 229 Cal.App.4th 1501, 1511.) "The people insist on remaining informed so that they may retain control over the instruments they have created." (§ 54950.)

The parties' arguments principally call upon us to interpret statutory exceptions to the Brown Act's notice and open meeting requirements. Our function " 'in construing a statute "is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted." ' " (*Shapiro v. Board of Directors* (2005) 134 Cal.App.4th 170, 180.) "If the language is clear and unambiguous, the plain meaning of the statute governs, and that meaning must be applied according to its terms. [Citation.] 'If, however, the statutory terms are ambiguous, then we may resort to extrinsic sources, including the ostensible objects to be achieved and the legislative history.' [Citation.] Highly relevant to our interpretation here is the rule that '[s]tatutory exceptions authorizing closed sessions of legislative bodies are construed narrowly and the Brown Act "sunshine law" is construed liberally in favor of openness in conducting public business.' " (*Ibid.*)[4]

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brevity, we will often refer to the legislative body simply as the local agency.

[4] To bolster their argument for narrowly construing the closed session (§ 54957) and emergency meeting (§ 54956.5) provisions of the Brown Act, appellants cite language added to the California Constitution with the passage of Proposition 59 in the November 2004 general election. This citation does not materially contribute to our statutory analysis because

III. Metrolink acted within its discretion by holding a closed meeting on September 2, 2015.

Notwithstanding the Brown Act's general mandate that "[a]ll meetings of the legislative body of a local agency shall be open and public" (§ 54953, subd. (a)), section 54957, subdivision (a) states that the act "shall not be construed to prevent the legislative body of a local agency from holding closed sessions with the Governor, Attorney General, district attorney, agency counsel, sheriff, or chief of police, or their respective deputies, or a security consultant or a security operations manager, on matters posing a threat to the security of public buildings, a threat to the security of essential public services, including water, drinking water, wastewater treatment, natural gas service, and electric service, or a threat to the public's right of access to public services or public facilities."

The trial court concluded that the language exempting "matters posing a threat" to the security of essential public services (§ 54957) from the Brown Act's general mandate encompassed potential security threats to a public transportation service. Appellants challenge this construction, arguing the language does not embrace, and the Legislature did not intend to

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sections 54596.5 and 54957 preexisted Proposition 59's passage, and thus fall under the constitutional provision's savings clause, which states: "This subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records or meetings of public bodies that is in effect on the effective date of this subdivision." (Cal. Const., art. 1, § 3, subd. (b), par. (5); see *Shapiro v. Board of Directors*, *supra*, 134 Cal.App.4th at p. 181, fn. 14.)

include, "mechanical defects" that "may pose a threat" (boldface omitted) to security among the matters justifying a closed session. They also contend the court's construction violated the directive to construe exceptions to the Act's open meeting requirement narrowly. Apart from these statutory interpretation issues, appellants argue the court erred by crediting what they contend was "Metrolink's speculation" in finding the board acted within its discretion.

We disagree with appellants' statutory construction arguments.[5] To address these arguments, we first reiterate what the board understood about the security threat its operations faced. According to its CEO, after conducting a "fairly detailed analysis" of an expert's preliminary findings regarding the Oxnard derailment, Metrolink's executive team had come to "understand that the concern raised by the accident investigator implicated the security of Metrolink's ongoing operations" and, if that information was "accurate and known by the wrong people, [it] could be exploited to cause mass harm to both Metrolink's riders and the public at large."

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[5] Appellants also suggest a "question also exists [as to] whether Metrolink's transportation services fall within . . . section 54957's use of the phrase 'essential public service.' " They note Metrolink's 42,000 daily riders equate to only 0.19 percent of Southern California's estimated population of more than 22 million people, and advance the assumption that this ridership is not equivalent to the presumed number of people who use electricity and water services. Appellants did not sufficiently develop this argument in the trial court or on appeal and so we do not consider it. (See *Walt Disney Parks & Resorts U.S., Inc. v. Superior Court* (2018) 21 Cal.App.5th 872, 877, fn. 4.)

Section 54957's text and legislative history evidence an intent to grant local agencies flexibility to address security concerns without disclosing vulnerabilities to potential malfeasants. Starting with the text of the statute, the trial court found the phrase "matters posing a threat" to be a "generalized and broad" expression that, according to its plain meaning and common usage, would "encompass[ ] any facts or circumstances" "presenting or constituting . . . potential as well as actual threats."[6] (See *Gillespie v. San Francisco Pub. Library Com.* (1998) 67 Cal.App.4th 1165, 1174.) However, the phrase is also susceptible of a more narrow construction—one that does not encompass *any* circumstance threatening harm to the public, but rather conforms the exception to the Brown Act's aim of promoting openness in the conduct of public business, so long as openness does not *itself* pose a threat to public security. Narrowly construing the exception to encompass only those circumstances where public dissemination of the matter under consideration poses a threat to security is consistent with

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[6] We also agree with the trial court that the words "matters posing" modify the succeeding words "a threat" in each subsequent clause in section 54957, subdivision (a)—not just the initial clause concerning threats "to the security of public buildings." These words are part of the three-word phrase, "on matters posing" that directly follows the list of officials and personnel with whom a local agency may meet in closed session. To read that phrase out of the subsequent clauses, as appellants advocate in their reply brief, would make the text incoherent. For example, the pertinent clause here would read: "This chapter shall not be construed to prevent the legislative body of a local agency from holding closed sessions . . . a threat to the security of essential public services." (§ 54957, subd. (a).)

section 54957's pertinent legislative history. (*Shapiro v. Board of Directors, supra,* 134 Cal.App.4th at p. 180.)

When enacted in 1953, the Brown Act did not have a provision for closed sessions related to security. The Legislature amended section 54957 in 1961 to authorize closed "executive sessions to consider . . . matters affecting the national security." (Stats. 1961, ch. 1671, § 4, pp. 3637–3638.)

In 1971, the Legislature amended section 54957 again to authorize closed sessions with the Attorney General, district attorney, sheriff, chief of police or their deputies, on matters posing a threat to the security of public buildings or a threat to the public's right of access to public services or public facilities. (Stats. 1971, ch. 587, § 1, p. 1180.) A committee report notes the Alameda County Board of Supervisors introduced the amendment, citing concerns that the county had become "a focal point for student protests and 'third world' political movements." (Sen. Com. on Gov. Organization, Rep. on Sen. Bill No. 833 (1971 Reg. Sess.) May 20, 1971, p. 1.) In support of the legislation, the board of supervisors argued "high security trials, bombings of public buildings, potentially violent mass protests, all require[d] planning for the protection of the public and public employees, which, *if discussed in a public meeting or publicized in the media, would limit or destroy the effectiveness of such planning*." (*Id.* at p. 2, italics added.) The bill's sponsor reiterated that concern in a letter to the Governor, explaining the "need for the bill arises from the increasing number of mass demonstrations, high-tension trials, and other confrontations, as to which the public agencies must plan, but as to which, under existing law, not only can the press be present and publicize such plans, but the very participants who plan to be involved in these activities can also

be present and learn about the plans in advance." (Sen. Holmdahl, sponsor of Sen. Bill No. 833 (1971 Reg. Sess.), letter to Governor, Aug. 11, 1971.)[7]

In 2002, following the September 11, 2001 terrorist attacks, the Legislature amended section 54957 to add security consultants, security operations managers, and agency counsel to the list of individuals permitted to attend closed sessions, and to expand the matters warranting a closed session to include those posing "a threat to the security of essential public services, including water, drinking water, wastewater treatment, natural gas service, and electric service." (Stats. 2002, ch. 1120, § 2, p. 94.) The chief concern moving the amendment's adoption, identified almost uniformly in the materials offered in its support, was that, "[i]n the aftermath of the events of September 11th," local governments needed to "reassess[ ] the security and potential vulnerability of facilities," and that

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[7] The trial court sustained Metrolink's evidentiary objection to Senator Holmdahl's letter premised on the proposition that a "statement of an individual legislator not communicated to the legislature as a whole . . . is not one of the 'documents constituting cognizable legislative history.' " However, a letter from a bill's author to the Governor would constitute legislative history, if there is an indication that the author's view was made known to the Legislature as a whole. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 37.) Here, Senator Holmdahl's statement largely tracks contemporaneous committee reports on the bill, indicating his views were made known to the Legislature as a whole. Thus the trial court properly relied upon the letter in construing the statute and the error in sustaining Metrolink's objection was harmless.

discussing "security-related issues, concerns and preventative measures . . . in open session would compromise existing security and defeat the purpose of discussing security issues at all." (Sen. Local Gov. Com., Republican Caucus analysis of Assem. Bill No. 2645 (2001–2002 Reg. Sess.) June 13, 2002, p. 44; see Sen. Rules Com., Off. of Sen. Floor Analysis, 3d reading analysis of Assem. Bill No. 2645 (2001–2002 Reg. Sess.) as amended June 13, 2002, pp. 2–3.) Further, as the bill's author explained, the amendment sought to address not just security measures under consideration, but also the dissemination of information about vulnerabilities that terrorists might exploit to cause mass harm. The author stated, "[i]t is counterproductive to discuss the lack of security measures currently in place and the specific methods being contemplated or implemented in open meetings which could be relayed to *those possibly wanting to take advantage of the lack of security*." (Assem. Local Gov. Com., Release by Assem. Mem. Aanestad on Assem. Bill No. 2645 (2001–2002 Reg. Sess.) p. 1, italics added.)

As this legislative history demonstrates, the concern underpinning each of the pertinent amendments to section 54957 was the Legislature's recognition that the public dissemination of certain sensitive information could reveal vulnerabilities in the security of public buildings and critical infrastructures, and that exposing proposed plans to address such vulnerabilities could undermine efforts to secure them. Thus, in narrowly construing the otherwise broad phrase "matters posing a threat" (§ 54957, subd. (a)), we conclude a local agency has discretion to hold a closed session only if *public disclosure* of the matters would *itself* pose a threat to the security of public buildings, essential public services, or the public's right of access to public services or public

facilities. We conclude therefore, that section 54957 authorizes a closed session to discuss security threats posed by a mechanical defect that could be exploited to cause mass harm to commuter rail travelers.

Applying this limitation to the simple mechanical problems that appellants posit in their slippery slope argument underscores the difference between mechanical defects that would justify a closed session and those that would not. For instance, appellants argue reading section 54957 to include mechanical defects would "allow an agency to participate in a secret discussion about a flawed muffler on a Metro bus (or even a faulty oil change filter), on the theory that a stalled bus could pose a 'threat to public services' " or that "overheating radiators . . . might cause mass havoc if a bus broke down on the freeway or Figueroa Street." But those sorts of mechanical issues, even if widespread and affecting an entire fleet of Metro buses, would not authorize a closed session under our reading of section 54957, because nothing about their disclosure would pose a security threat. The threat in those cases is intrinsic to the defect itself, and does not depend upon a bad actor learning of the defect in an attempt to exploit it. By contrast, to expand on another of appellants' hypotheticals, were a municipal utility to discover a vulnerability in the power grid that cyber terrorists could exploit to disrupt electrical services, the concerns that compelled the Legislature to amend section 54957 in 2002 would plainly materialize, and the local agency would have discretion to hold a closed session to address the vulnerability, given past instances of such groups exploiting similar vulnerabilities to launch attacks. (See, e.g., O'Brien & Ayres, *Cyberattack using data-scrambling software causes disruptions in Europe*, L.A.

Times (June 27, 2017) <http://www.latimes.com/world/europe/la-fg-europe-cyberattack-20170627-story.html> [as of Aug. 28, 2019] [reporting on large cyberattack disrupting, among other things, Ukraine power grid].) The critical difference between these two defects is, in the latter case, the mere existence of the defect does not pose a threat to security; rather, it is the public dissemination of information about the defect that poses the threat.

In view of section 54957's legislative history, we also reject appellants' contention that the exception must be read to exclude "potential" threats. Whether the Legislature was considering the possibility of continuing inflammatory protests as had roiled Alameda County before the 1971 amendment, or future terrorist attacks as local governments feared in the wake of September 11, 2001, the legislative history plainly demonstrates that the Legislature intended to grant local agencies flexibility to identify vulnerabilities and *plan for* potential threats in private before an actual threat became imminent. (See, e.g., Assem. Local Gov. Com., Release by Assem. Mem. Aanestad on Assem. Bill No. 2645 (2001–2002 Reg. Sess.) p. 1.)

Finally, although we agree with appellants that speculative concerns cannot justify a closed session, we disagree with their implicit contention that the board acted entirely without evidentiary support when it determined public dissemination of the accident investigator's findings would pose a threat to the security of Metrolink's operations. (Cf. *California State University, Fresno Assn., Inc. v. Superior Court* (2001) 90 Cal.App.4th 810, 835 ["Unsupported statements constitut[ing] nothing more than speculative, self-serving opinions" do not justify withholding "information to which the public is entitled."].) According to the sworn declaration of Metrolink's

CEO, after conducting a "fairly detailed analysis" of the investigator's findings, the executive team came to understand that the "safety issue" to be addressed was one that, if "known by the wrong people, could be exploited to cause mass harm to both Metrolink's riders and the public at large." Appellants argue this concern was speculative, because there was no evidence that "malfeasants had already learned about the defect." But that was precisely the reason to meet in a closed session: to mitigate the threat that would arise if malfeasants knew of the safety vulnerability. Where there is evidence of a potential threat, it is not speculation to recognize the harm that could arise from it.

Nor did the board speculate or act entirely without evidence when it determined malfeasants might use the investigator's findings to cause a train derailment. As Metrolink's CEO recounted in his declaration, in 2005, 11 people were killed when a Metrolink train derailed near Glendale after colliding with a vehicle that a man intentionally left on the tracks in an attempt to kill as many people as possible.[8] While

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[8] According to Metrolink's CEO, when the board made its decision to hold a closed meeting, investigators had yet to determine whether the Oxnard derailment was similarly the result of intentional misconduct. To the extent appellants attempt to paint the board's decision as speculative by emphasizing that no attack occurred after the Times published details about certain design flaws in Metrolink cab cars, we agree with Metrolink that the reasonableness of the board's decision must be judged based on the information available to it at the time it made the decision, not based on hindsight informed by later developments. (Cf. *Reese v. Wal–Mart Stores, Inc.* (1999) 73 Cal.App.4th 1225, 1237 [appellate court assesses whether trial court abused its discretion based on state of the record at the

appellants may question the likelihood that someone else would repeat such an attack, weighing this probability against the magnitude of the harm that could occur was a matter committed to the Metrolink board's reasonable judgment. We cannot second guess that judgment, or say the board engaged in pure speculation, when a past incident substantiated its fear that an individual would be willing to exploit the investigator's findings to cause a derailment. (See *Helena F., supra,* 49 Cal.App.4th at p. 1799.) In view of this evidence, the Metrolink board did not abuse its discretion to hold a closed session under section 54957.

IV. Metrolink did not abuse its discretion by holding an emergency meeting

The Brown Act mandates that the public shall receive adequate notice of every item that is to be discussed at every public meeting, including closed sessions. Before any meeting, a local agency must "post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session." (§ 54954.2, subd. (a)(1).) No action or discussion may be undertaken on an item that does not appear on the posted agenda. (*Id*., subd. former (a)(2).)

The Brown Act identifies three types of meetings: regular, special, and emergency. Regular meetings must be preceded by an agenda posted at least 72 hours in advance. (§§ 54954, subd. (a), 54954.2, subd. (a)(1).) A local agency can call a special meeting at any time by delivering written notice of "the business to be transacted or discussed" to "each local newspaper of general

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time the trial court's decision was made, not based on later developments].)

circulation and radio or television station requesting notice" at least 24 hours before the meeting. (§ 54956, subd. (a).)

Unlike regular and special meetings that have no restrictions on when they may be called, a local agency is authorized to hold an emergency meeting only in "the case of an *emergency situation* involving matters upon which *prompt action is necessary* due to the disruption or threatened disruption of public facilities." (§ 54956.5, subd. (b)(1), italics added.) An emergency situation means either (1) an emergency, defined as "a work stoppage, crippling activity, or other activity that severely impairs public health, safety, or both, as determined by a majority of the members of the legislative body" (*id.*, subd. (a)(1)); or (2) a "dire emergency," defined as "a crippling disaster, mass destruction, terrorist act, or threatened terrorist activity that poses peril so immediate and significant that requiring a legislative body to provide one-hour notice before holding an emergency meeting under this section may endanger the public health, safety, or both, as determined by a majority of the members of the legislative body (*id.*, subd. (a)(2)).[9]

In the case of an "emergency," the local agency must give notice to each local newspaper and radio or television station at

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[9] During an emergency meeting, "the legislative body may meet in closed session pursuant to Section 54957 if agreed to by a two-thirds vote of the members of the legislative body present, or, if less than two-thirds of the members are present, by a unanimous vote of the members present." (§ 54956.5, subd. (c).) By requiring such a vote to close an emergency meeting, the statutory scheme "ensure[s] that a conscious decision is made before proceeding with the closed session." (Sen. Local Gov. Com., Analysis of Sen. Bill No. 1643 (2001–2002 Reg. Sess.) Apr. 9, 2002, p. 3.)

least "one hour prior to the emergency meeting." (§ 54956.5, subd. (b)(2).) If confronted with a "dire emergency," the local agency must give notice "at or near the time that the presiding officer or designee notifies the members of the legislative body of the emergency meeting." (*Ibid.*) Metrolink gave one hour notice to the public on September 2, 2015, indicating its conclusion that the matter constituted an emergency as opposed to a dire emergency.

A. *Emergency situation*

Appellants contend Metrolink "faced no 'emergency situation' " as defined in section 54956.5, subdivision (a). They make the now familiar argument that "information" about " 'potential' design flaws" does not constitute, in the words of the statute defining an emergency situation, an "activity that severely impairs public health, safety, or both." (*Id.*, subd. (a)(1).) Metrolink responds that the exigent activity was running trains "every day with cab cars that, at the time, appeared to be more susceptible to derailment than they should have been," and that "appeared to be subject to intentional derailment," urging that the "need to evaluate that risk and the proposed solution was both immediate and urgent," while being done in a balanced manner.

"The word 'emergency' as used in legislative enactments does not always have precisely the meaning ascribed to it by lexicographers. [Citation.] It may be defined by the statute or ordinance," and "[i]f so, an interpretation thereof must be confined to and limited by such definition and the subject matter enacted." (*Fennessey v. Pac. Gas & Elec. Co.* (1942) 20 Cal.2d 141, 143.) That principle plainly applies when interpreting the emergency situation exception to the Brown Act's notice

requirements, for which strict construction is mandated. (*Shapiro v. Board of Directors*, *supra*, 134 Cal.App.4th at p. 180.) Nonetheless, as a general proposition, for all statutory definitions of emergency, emergency cannot be construed to be synonymous with "expediency, convenience, or best interests." (*Sonoma County Organization etc. Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267, 277; see § 11346.1, subd. (b)(2).) "Emergency comprehends a situation of 'grave character and serious moment.' " (*Sonoma County*, at p. 277.)

We disagree with appellants that the discovery of a " 'potential' design flaw" can never give rise to an emergency situation under section 54956.5. Unlike the definition of "dire emergency," which is specifically restricted to "a crippling disaster, mass destruction, terrorist act, or threatened terrorist activity" (§ 54956.5, subd. (a)(2)), an emergency is defined by the statute to include "a work stoppage, crippling activity, or *other activity* that severely impairs public health, safety, or both" (*id.*, subd. (a)(1), italics added). We narrowly interpret the clause "other activity," as being qualified by the succeeding phrase, "that severely impairs public health, safety, or both." As written, the phrase reflects the Legislature's intent to reach any form of activity provided it would severely impair public safety and/or health. Such an activity could include mechanical defects in water delivery, electrical, or commuter rail systems. Moreover, the statute refers to a "*threatened* disruption of public facilities" (*id.*, subd. (b)(1), italics added), and so appellants are wrong when they assert that an emergency meeting "can only be called once an 'emergency situation' has actually happened." It does the public no good to require local agencies to wait until activity has already impaired public safety to hold a meeting. Use of the

words *threatened* disruption in section 54956.5, subdivision (b)(1) suggests it is the immediacy of the threat posed by the activity, and not necessarily the imminence of the harm that may result, that authorizes an emergency meeting. In short, we can easily conceive of a situation in which running numerous trains with a known safety-related design defect that threatens to cause a derailment in a collision can constitute an activity that severely impairs public health, safety, or both, and hence be an emergency situation.

B. *Prompt action*

For a local agency to hold an emergency meeting, the emergency situation must "involve matters upon which *prompt action is necessary* due to the disruption or threatened disruption of public facilities." (§ 54956.5, subd. (b)(1), italics added.)

The parties agree that "prompt" means "quick[ ]," "without delay," or "immediate." With respect to the word "action," appellants argue that in emergency meetings, action consists of a decision or a vote, and not mere deliberation. Appellants cite section 54952.6, which defines action *taken* for purposes of the chapter on meetings, as including "a collective commitment or promise by . . . a legislative body *to make a* positive or a *negative decision*, *or* an actual *vote*." (Italics added.) They observe that no action, let alone prompt action, was necessary and point to Metrolink's judicial admissions that at the September 2, 2015 meeting, the board received, evaluated, and discussed the risk and the proposed solution but neither voted on any matter nor authorized any action at the time. Metrolink counters that the meaning of action is not confined to making decisions and taking votes. The agency observes that in relying on sections 54960 and 54960.2 to bring this proceeding in the first place, appellants

expressly identified the September 2, 2015 emergency session as *action*.

The common meaning of action ranges widely from "a proceeding in a court" to generally a "thing done." (Webster's Ninth New Collegiate Dict. (1983) p. 54, col.1.) Viewing the language of the Brown Act's chapter 9 on meetings to harmonize its different components (*San Diego Unified School Dist. v. Yee* (2018) 30 Cal.App.5th 723, 732; Code Civ. Proc., § 1858) in favor of the policies and purposes of the Brown Act for openness (*Shapiro v. Board of Directors*, *supra*, 134 Cal.App.4th at p. 180), it is clear the conduct that occurs in Brown Act meetings involves more than decisions or votes. The declared legislative intent behind chapter 9 is that both actions and "*deliberations* be conducted openly." (§ 54950, italics added.) Thus, "[i]t is now well settled that the term 'meeting,' as used in the Brown Act [citations], is not limited to gatherings at which action is taken by the relevant legislative body; '*deliberative gatherings*' are included as well. [Citation.] *Deliberation* in this context connotes not only collective decisionmaking, but also 'the collective *acquisition and exchange of facts preliminary to the ultimate decision*.' " (*Frazer v. Dixon Unified School Dist.* (1993) 18 Cal.App.4th 781, 794, italics added.) Section 54952.6, relied on by appellants, includes in its definition of action taken in any meeting, the "collective *commitment or promise . . . to make a* positive or *negative decision*." (Italics added.)

While *Frazer v. Dixon Unified School Dist.*, *supra*, 18 Cal.App.4th at pages 794 to 795 and the authorities it cited read the term " 'meeting' " expansively in favor of openness, the history of the amendments to the Brown Act creating the exceptions to open meetings indicates that the Legislature

envisaged that emergency meetings would include fact gathering and decisionmaking. When enacting section 54956.5 to authorize emergency meetings, the Legislature stated that local agencies "would be required to meet *to determine* whether or not such an emergency situation actually exists" (italics added) and could "*consider* . . . matters concerning threats to the security of public buildings or services."[10] (Italics added.) Furthermore, contemporaneous statements made about the 2002 amendments to section 54956.5 judged that in emergencies, local agencies needed "increased flexibility"[11] in meetings to "discuss"[12] and to "address issues related to vulnerability of public facilities and security enhancement strategies."[13] Having concluded that local agencies faced with an emergency situation needed to meet on less than 24 hours' notice, the Legislature clearly expected such agencies would act deliberately and not rashly. Narrowly

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[10] Senate Committee on Local Government analysis of Senate Bill No. 110 (1979–1980 Reg. Sess.) as amended March 7, 1979, pages 2 to 3; Senate Republican Caucus Analysis of Senate Bill No. 110 (1979–1980 Reg. Sess.) as amended March 7, 1979, page. 2.

[11] Assembly Committee on Housing and Commmunity Development, Republican Analysis of Senate Bill No. 1643 (2001–2002 Reg. Sess.) as amended May 29, 2002, page 1.

[12] Senate Rules Committee, Office of Senate Floor Analyses, 3d Reading of Assembly Bill No. 2645 (2001–2002 Reg. Sess.) as amended June 13, 2002, page 1; Governor's Office of Emergency Services, Enrolled Bill Report on Assembly Bill No. 2643 (2001–2002 Reg. Sess.) June 27, 2002, page 1.

[13] See footnote 11, *ante*.

construing the section 54956.5 exception to the Brown Act's notice requirements (*Shapiro v. Board of Directors*, *supra*, 134 Cal.App.4th at p. 180), the word "action" in prompt action involves meeting to acquire and exchange facts and to discuss the vulnerabilities of public facilities and methods for improving security in response to threats to public health and/or safety, and making the decision to take, or not to take, action.[14]

We disagree with appellants' supposition that proof that prompt action was not necessary here lay in the fact the board took no action at the meeting and Metrolink took no action for more than a month when it approved the leasing of 40 locomotives from BNSF. Under appellants' view, local agencies could only determine whether "prompt action" was needed by looking at the decisions the legislative bodies came to

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[14] The Supreme Court has treated similar materials as being entitled to some interpretive value when considering legislative history. (See *United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.* (2018) 4 Cal.5th 1082, 1088 [floor analysis]; *Scher v. Burke* (2017) 3 Cal.5th 136, 149 [enrolled bill memorandum]; *Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1218 [enrolled bill report to the Governor]; *In re Lucas* (2012) 53 Cal.4th 839, 853 [Republican bill analysis].)

Metrolink points to letters from supporters of Senate Bill No. 1643. As explained in footnote 10, *ante*, however, when reviewing legislative history our task is to ascertain the intent of the Legislature as a whole. Letters of a bill's supporters simply state the views of those authors in an attempt to influence legislators' views and shed no light on the intent of the Legislature as a whole. Thus, there is no interpretive value in such letters. (*McDowell v. Watson* (1997) 59 Cal.App.4th 1155, 1161, fn. 3.)

at the close of the meeting, rather than on facts known to the agency when it made the decision to hold the emergency session in the first place. This post hoc evaluation would, in Metrolink's words, cause local agencies to "risk stumbling backward into a Brown Act violation by receiving information" and deciding after deliberation that no action was required after all. Such Monday-morning quarterbacking would also undermine the legislative aim in amending section 54956.5.[15] The instigation for the 2002 amendments was a problem experienced by Orange County Supervisors who had scheduled a regular meeting for September 12, 2001, but were prevented by the notice requirement from discussing on an emergency basis threats posed by the terrorist attacks the previous day. The fact that in hindsight the supervisors were not faced with a terrorist threat on September 12, 2001, undermined neither their conclusion they had an emergency situation that demanded prompt action, nor the necessity for the amendments to the statute.

Rather than to assess the board's decision in hindsight, we consider what Metrolink knew at the time it made the decision to hold an emergency meeting under section 54956.5. Metrolink's declarations show that the accident investigator had identified a concern that "implicated the security of Metrolink's *ongoing operations*; it was information that, if accurate and known by the wrong people, could be exploited to cause mass harm to both Metrolink's riders and the public at large." (Italics added.) Yet, Metrolink was not, as appellants suggest, faced with a mere "possibility that an emergency situation could exist in the future, under a very implausible set of circumstances," (boldface omitted)

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[15] See footnote 11, *ante*.

or merely faced with faulty welds, bolts, and brackets on the plows.[16] Metrolink also knew that the driver of the truck left on the track in the Oxnard collision just months earlier killed the engineer and injured 30 people, with no indication that the driver possessed specific knowledge of the defect in the cab cars, or even that he intended to cause the derailment. With this information, Metrolink reasonably determined it needed to hold an emergency meeting to address the "operational security issues" and "plan for addressing related risks," while maintaining Metrolink's commuter service to the greatest extent possible, given that its trains with the defect were running passengers up and down Southern California numerous times every day.

In any event, the independent transportation consultant clarified that while colliding with a vehicle parked on tracks will not ordinarily cause a train to derail, the chance of derailment may be increased by certain kinds of manufacturing and design defects and that a person seeking to derail a passenger train and cause catastrophic, mass-casualty "would have a *better* chance of succeeding if armed with specific knowledge" of the defect and about "the specific nature of the defect," and with such knowledge "would be *better able* to create the conditions necessary to cause an actual derailment." (Italics added.) But, better is not synonymous with only.

Unlike the purpose of closed meetings under section 54957, namely to prevent public dissemination of sensitive information about the defect, the goal of emergency meetings is to meet

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[16] Articles cited by appellants that were published in 2016 commenting on the accident after the fact are not evidence about what the board members knew at the time they voted to hold the September 2, 2015 meeting.

quickly to discuss a matter that threatens to disrupt a public facility and to impair public health and/or safety, and to consider strategies to enhance security. Confidentiality is not a factor in deciding whether to hold emergency meetings, which may be held in open session. (See § 54956.5, subd. (c).) The facts the board had when it voted to hold the September 2, 2015 meeting on an emergency basis were that a train equipped with defective cab cars had already derailed in the Oxnard collision without any indication the driver had the specific knowledge identified by the investigator. We will not second guess Metrolink's judgment that it needed to meet quickly to respond to a defect that threatened to produce a derailment and discuss plans to address the problem, irrespective whether a wrongdoer had any specific knowledge of the nature of the defect or any intent to cause harm.

Nor is the reasonableness of the board's conclusion it had an emergency situation or its decision to call its meeting on an emergency basis undermined by the three-day gap between August 31, 2015, when Metrolink's legal department notified the board's executive team of the defect, and September 2, 2015, when the board convened its meeting. Appellants argue that prompt action means that the action must occur in less than 24 hours. Viewing the evidence in the light most favorable to the board's judgment, the information it had was "detailed and complex, technical" in nature and the investigator who identified the concern was traveling and difficult to reach for consultation "and explanation." Left on their own, the CEO and other members of the executive team needed time to process and understand the implications. "After conducting a fairly detailed analysis of the preliminary information," the CEO came to

understand around 11:00 a.m. on September 2, 2015 that it was "critical . . . to advise Metrolink's Board of Directors regarding the safety concern with the cab cars, the . . . operational security issues, and the Executive Team's plan for addressing related risks." The board held its meeting just six hours later. This is precisely what the Legislature authorized local agencies to do: to quickly and consciously assess risks and discuss methods for the protection of the public's health and safety. As explained, we defer to the board's judgment in determining the urgency of the matters and the magnitude of the purported threat and refrain from substituting our judgment for that of the board. We simply cannot say that no reasonable person would have determined, at the time the board decided to hold the emergency meeting, that derailment of Metrolink trains was not a threatened disruption of a kind that would severely impair public safety, and that a prompt meeting was not needed to decide on a plan, irrespective of whether a malefactor possessed any detailed information about the defect, because the Oxnard incident itself demonstrated otherwise. The presence of the defect itself posed a threat to public safety because it increased the likelihood of derailment upon collision with another vehicle. Whether a vehicle were to stall on the tracks or be left there intentionally, the risk to passengers and the public at large was manifest and ever present as long as the defective cab cars continued to run.

V. Metrolink did not violate the Brown Act by holding its closed, emergency meeting by teleconference.

Section 54953, subdivision (b)(1) authorizes a local agency to "use teleconferencing for the benefit of the public and the . . . local agency in connection with any meeting or proceeding," provided that the "teleconferenced meeting or

proceeding shall comply with all requirements of this chapter [on meetings] and all otherwise applicable provisions of law relating to a specific type of meeting or proceeding." If the local agency elects to use teleconferencing, the statute mandates, as is relevant here, that the agency "shall post agendas at all teleconference locations and conduct teleconference meetings in a manner that protects the statutory and constitutional rights of the parties or the public appearing before the legislative body of a local agency"; "[e]ach teleconference location shall be identified in the notice and agenda of the meeting or proceeding, and each teleconference location shall be accessible to the public"; and "[t]he agenda shall provide an opportunity for members of the public to address the legislative body directly . . . at each teleconference location." (*Id.*, subd. (b)(3).)

The emergency meeting statute contains its own notice provisions. Section 54956.5 directs local agencies to comply with the requirements of section 54956 pertaining to notices for special meetings, except for the 24-hour notice requirement. (§ 54956.5, subd. (d).) Section 54956.5, subdivision (b)(2) then commands notice be given "one hour prior to the emergency meeting."

Metrolink held the September 2, 2015 meeting by teleconference. Although there is no dispute that the board obeyed the notice requirements dictated by section 54956.5 for emergency meetings, the agency admits that it did not identify each teleconference location in the agenda for the meeting, and it did not post the agenda at every teleconference location used for the meeting, as is required by section 54953. Because board members' call-in locations were not known when the secretary prepared and circulated the agenda and when the board provided

notice to the public of the meeting, the board provided a conference room with a connection to the teleconference line at Metrolink headquarters. The trial court ruled that Metrolink did not violate section 54953 because it concluded that the statute's agenda requirements do not apply to an emergency meeting under section 54956.5.

The trial court based its conclusion in part on that provision in section 54956.5, subdivision (d), which states, "[a]ll special meeting requirements, as prescribed in Section 54956 shall be applicable to a meeting called pursuant to this section, with the exception of the 24-hour notice requirement." The court noted, although the Legislature could have incorporated the section 54953 teleconference provisions into section 54956.5 when enacting the latter statute, it did not. Under the maxim *expressio unius est exclusio alterius*, section 54956.5's express reference to the notice requirements prescribed in section 54956 implicitly excludes the teleconference rules specified in section 54953.

More important, as the trial court noted, section 54956.5 "dispenses altogether with requirements for posting agendas." Section 54956.5, subdivision (b)(1) allows an agency to "hold an emergency meeting *without complying with* either the 24-hour notice requirement or *the 24-hour posting requirement* of Section 54956 *or both of the notice and posting requirements*." (Italics added.) Furthermore, section 54954.2, subdivision (b)(1), governing agendas and posting, allows a local agency to take action on business not appearing on a posted agenda in an emergency situation under section 54956.5. Finally, in emergency situations, local agencies may provide one-hour notice *by telephone* only. (§ 54956.5, subd. (b)(2).) Taken together, these provisions reflect the Legislature's recognition that the

posting requirement could hamper prompt action (cf. Assem. Com. on Housing and Community Dev., Republican analysis of Sen. Bill No. 1643 (2001–2002 Reg. Sess.) as amended May 29, 2002, p.1 [bill provided increased flexibility to local agencies to address emergencies and dire emergencies]), particularly when, as here, the board secretary did not know the board members' call-in locations when she was preparing the notice. As a practical matter, the public is best served by allowing local agencies to act promptly in emergencies, without strict compliance with the teleconference rules in section 54953.

Metrolink's conduct was consistent with the objectives of the Brown Act generally, namely to ensure the public's right to attend local agency meetings to facilitate public participation in all phases of local government decisionmaking (*Chaffee v. San Francisco Library Commission* (2004) 115 Cal.App.4th 461, 469), and the teleconference statute in particular, which mandates that teleconference meetings be conducted "in a manner that protects the statutory and constitutional rights of *the parties or the public appearing before the legislative body* of a local agency" (§ 54953, subd. (b)(3), italics added). Metrolink made the conference room available at its headquarters with a connection to the teleconference line, and then voted to close the meeting. The public was able to hear and object to the vote to close the meeting but was not expected to appear before the board after the meeting closed. Therefore, appellants were not prejudiced by the actions by Metrolink, which protected the rights of the parties appearing before it. (See *Ibid.*; *Galbiso v. Orosi Public Utility Dist.* (2010) 182 Cal.App.4th 652, 671.)

## VI. Appellants fail to demonstrate prejudicial error in the trial court's evidentiary rulings

Appellants argue the trial court improperly excluded (1) news articles published after the September 2, 2015 meeting purporting to shed light on the nature of the defect affecting Metrolink's cab cars; and (2) a few items of correspondence reflecting the views of outside groups and individual legislators about the purpose of the pertinent amendments to the Brown Act. As we have noted, to the extent the trial court erred in excluding cognizable legislative history, the error was not prejudicial and has not affected our independent interpretation of the statutes. (See fn. 10, *ante*.) As for the news articles, because the articles reflected events that occurred after the board made the challenged decisions, the court reasonably determined they were not relevant to assessing the basis for the board's actions. (See, e.g., *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 578 [extra-record evidence offered to challenge an administrative action is admissible only if it "existed before the agency made its decision"].)

Appellants also contend the court erred by failing to rule on their objections to evidence Metrolink submitted. Those objections challenged the admissibility of statements made in the declarations of Metrolink's officers and an independent transportation expert, on the grounds that they lacked foundation, contained improper hearsay, and were speculative. Yet, the record shows the statements communicated the declarants' mental impressions regarding information of which they had personal knowledge. The court did not abuse its discretion in impliedly overruling appellants' objections.

VII. Appellants are not entitled to equitable relief

Section 54960.2, subdivision (a) authorizes "any interested person [to] file an action [under section 54960] to determine the

applicability of [the Brown Act] to past actions of the legislative body" if the person "first submits a cease and desist letter . . . clearly describing the past action of the legislative body and nature of the alleged violation" (*id.*, subd. (a)(1)), and the "legislative body has not provided an unconditional commitment" (*id.*, subd. (a)(3)) to "not repeat the past action that is alleged to violate" the Brown Act (§ 54960.2, subd. (c)(1)). Section 54960, subdivision (a) authorizes "any interested person [to] commence an action by mandamus, injunction, or declaratory relief for the purpose of stopping or preventing violations or threatened violations of this chapter by members of the legislative body of a local agency . . . or to determine the applicability of this chapter to past actions of the legislative body, subject to Section 54960.2."

Although writ relief " ' "is not necessarily a matter of right" ' " and lies rather in the " ' "discretion" ' " of the court, " ' "where one has a substantial right to protect or enforce, and this may be accomplished by such a writ, and there is no other plain, speedy and adequate remedy in the ordinary course of law, he [or she] is entitled as a matter of right to the writ, or perhaps more correctly, in other words, it would be an abuse of discretion to refuse it." ' " (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 114.) As appellants have not established that Metrolink's past actions violated the Brown Act, they are not entitled to relief.

**DISPOSITION**

The judgment is affirmed. Southern California Regional Rail Authority is awarded its costs of appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

I concur:

EDMON, P. J.

**Egerton, J., Concurring and Dissenting.**

I concur with the majority's conclusion that the evidence justified the Metrolink board's decision to hold a closed session, but I disagree with the conclusion that the same evidence also justified the board's decision to hold an emergency meeting on less than 24 hours' notice. On this issue, I respectfully dissent.

Distinguishing between the statutory definition of "dire emergency," which is specifically restricted to "a crippling disaster, mass destruction, terrorist act, or threatened terrorist activity" (Gov. Code, § 54956.5, subd. (a)(2)), and the definition of "emergency," which includes "a work stoppage, crippling activity, or *other activity* that severely impairs public health, safety, or both" (*id.*, subd. (a)(1), italics added), the majority rightly rejects appellants' contention that a potential design flaw can never give rise to an emergency situation under the Brown Act.[1] As the majority observes, the reference to "other activity" suggests an intent to reach any form of activity that may severely impair public health or safety, including, in appropriate circumstances, running water delivery, electrical, or commuter rail systems with a dangerous mechanical defect. Moreover, I agree with the majority that the statute's reference to a "*threatened* disruption of public facilities" (Gov. Code, § 54956.5, subd. (b)(1), italics added) suggests it is the immediacy of the threat posed by the activity, and not necessarily the imminence of the harm that may result, that authorizes an emergency meeting.

Up to this point, I agree with the majority's analysis, and I can also easily conceive of a situation, *in the abstract*, in which

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[1] I adopt the shorthand references used in the majority opinion. Statutory references are to the Government Code.

running trains with a potential mechanical defect would meet the criteria for an emergency meeting. Where I must break with the majority is in its application of the statutory definition to the *specific undisputed evidence* in this case.

Considering a situation in which a mechanical defect would justify an emergency meeting helps to expose the insufficiency of the evidence and the internal inconsistency in the Metrolink board's decision to hold a *closed* emergency meeting based on the information it knew at the time it made the decision. For example, had the accident investigator found a potential defect in Metrolink's cab cars that could cause them to derail under operating conditions that the trains *regularly encountered*, the board would have had discretion under those circumstances to meet on emergency notice to address the *immediate threat posed by its active and ongoing operations*, even if the investigator's findings were only preliminary. In such circumstances, the board could be reasonably concerned that a derailment might happen *at any moment*, even if harm was not certain or imminent, and *prompt action would be demanded to address the threatened disruption*.

But critically for this case, the kind of mechanical defect that would justify an emergency meeting under section 54956.5 would not necessarily justify a *closed session* under section 54957. On the contrary, because the threatened disruption in the situation described above does not depend on the intervention of a bad actor with knowledge of the defect, the board would have no discretion to shield its discussions of the emergency situation from public view. The converse also must be true: if a safety or security vulnerability, like a mechanical defect, poses a risk *only if it is known to malfeasants*, and there is no evidence that

malfeasants have obtained knowledge of the vulnerability, a local agency cannot point to that vulnerability to justify a decision to deny the public its right to 24 hours' notice under the Brown Act.

Here, the undisputed evidence that justified Metrolink's decision to hold a closed session under section 54957 conclusively refutes its justification for calling an emergency meeting under section 54956.5. In his sworn declaration, Metrolink's CEO characterized "the concern raised by the accident investigator" as "information that, *if* accurate and *known by the wrong people*, could be exploited to cause mass harm to both Metrolink's riders and the public at large." (Italics added.) Metrolink bolstered its position that the threat stemmed from *disclosure of the information*, as opposed to the *defect itself*, with a supporting declaration from an independent rail transportation consultant, who declared "simply knowing that a train derailed after colliding with a vehicle would *do little* to aid a person seeking to derail a train because it is *relatively unlikely* that such a person would be able to recreate the conditions *necessary* to cause a derailment *without more specific information about the defect to be exploited.*"[2] (Italics added.) And, the trial court found, as

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[2] This is not to say that an emergency closed session never could be justified. For example, at the hearing, the trial court posited a hypothetical defect that could cause a derailment if someone "put a quarter on the tracks." Though the record does not disclose whether Metrolink trains regularly encounter quarters on the tracks, assuming they do, such a defect would justify both an emergency meeting and a closed session. With that sort of defect, Metrolink trains would be susceptible to inadvertent derailment from common mischief at any moment. And, they also would be susceptible to intentional derailment from a bad actor who might exploit the defect to threaten

Metrolink admitted, there was "no indication" that "malfeasants had already learned about the defect and threatened to act or engaged in preparations to take action" on it. Because the possible defect posed a threat only if "known by the wrong people," and there was no evidence that "malfeasants had already learned about the defect," there was no evidence to support the board's determination that it faced an emergency situation under section 54956.5. I would conclude the Metrolink board acted without evidentiary support, and thus abused its discretion. (See *No Oil, Inc. v. City of Los Angeles* (1987) 196 Cal.App.3d 223, 243.)

Because, in my view, the evidence was insufficient to justify an emergency meeting, I would not reach the question of whether the meeting itself constituted "prompt action" under section 54956.5, subdivision (b)(1).[3] With that said, I agree with the majority that the local agency's decision must be judged based on what it knew at the time it voted to hold the emergency meeting. However, given the Metrolink board's decision to take no immediate action to remove the defective cab cars from operation, it is difficult to embrace the majority's description of a defect that posed a "risk to passengers and the public at large [that] was *manifest and ever present as long as the defective cab cars*

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Metrolink's security. However, as the rail consultant's declaration made clear, the defect in this case was not the sort that would lead to an unintentional derailment from predictable mischievous conduct under *normal operating conditions*.

[3] Because I would conclude an emergency meeting was not justified, I also would conclude the board had no justification for failing to comply with the Brown Act's teleconference rules. (See § 54953, subd. (b)(1).)

*continued to run*." (Maj. opn., *ante*, at p. 32, italics added.) In my view, we (like the trial court) are obliged to give effect to the undisputed (and only) evidence on this issue: As Metrolink's CEO declared, "the concern raised by the accident investigator implicated the security of Metrolink's ongoing operations; it was information that, *if* accurate and *known by the wrong people*, *could be exploited* to cause mass harm to both Metrolink's riders and the public at large." (Italics added.) At the time it determined to hold an emergency meeting, the Metrolink board knew potential malfeasants had *not* learned of the defect—this was the reason the board held a closed meeting, and it is the only reasonable explanation for the board's decision not to immediately remove the cab cars from service to address the threat to its "ongoing operations." I respectfully dissent from the emergency meeting portion of the opinion.

EGERTON, J.